Office-Supreme Court, U.S.
FILED
MAR 26 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 687

In the Matter of the Application
of
A. CHENEY GREENE and EVELINA S. GREENE for
an order declaring unreasonable, illegal and void,
a certain search and seizure, etc.

REPLY BRIEF FOR PETITIONERS

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Statement

In view of the decision of the Court in *DiBella v. U. S.*, No. 21, and recent proceedings before the U. S. Commissioner, in the instant case, the petitioners submit this reply brief for the guidance of the Court and in support of their petition for certiorari.

Additional Facts and Proceedings

At the time of the motion before the U. S. District Court the matter was presented on affidavits, the principal of which was the affidavit of the Special Agent who conducted the investigation. In his affidavit the Special Agent stated "this was merely an investigation of a farmer's income tax return where wealth was accumulated over the

years *without violation of the Revenue Laws.*" The agent omitted from his affidavit, upon which the District Court's decision and the Circuit Court's decision was based, the important fact that the matter did not begin as a civil investigation, but in fact began as a criminal investigation and that the purpose of the very first interview was to obtain incriminating statements from the *present subjects* of a criminal investigation. This fact was not established or admitted until after the argument of the appeal and the Government refused to submit this additional fact as part of the record prior to the decision by the Second Circuit. [See Appendix to Petition, Pages 24 through 28]. In fact the Government, in its brief to the Second Circuit, in spite of this admission contended "there is no suggestion in any of the affidavits presented that this was other than a routine visit." Of course, where the Government itself omits an important fact from its own affidavit it can maintain, *contrary to* the true facts as *now known*, that the matter was routine and that no rights of the petitioners have been violated.

The purpose of the Special Agent's skinny or half affidavit was to bring the Greene case within the rule of *U. S. v. Sclafani*, 265 F. 2d 408 (2nd Cir. 1948) where the investigation in fact began as a routine civil matter. A combination of the misleading affidavit and the denial of a hearing before the District Court has brought the entire case to this Court upon an incomplete record and a decision based upon facts contrary to those now established and conceded by both parties.

In addition, the Government has also contended and the Second Circuit held that it "did nothing to obscure the implicit warning that any information or records they might obtain might be used in a criminal prosecution,"

[Appendix, Page 32], and that the Government shall not be criticized for not using the "cumbersome" statutory summons procedure. The true facts are as stated on Page 17 of the petition herein. The statutory summons is not cumbersome and was in fact used to obtain records from third parties in the instant investigation. It was only when dealing with petitioners, the present subjects of a criminal investigation that the agents obscured the implicit warning of a formal document summoning the requested papers. As pointed out in the petition and briefs in spite of the fact the Government had the right to the papers upon 10 days notice if it followed the procedure specifically provided by Congress, nonetheless the criminal agents for four months substituted the ingratiating half true and deceptive correspondence which the petitioners state without contradiction *did in fact deceive them.* The use of the statutory summons on third parties and the circumvention of the statute with the petitioners as stated on page 17 of the petition is not disputed by the Solicitor General's brief *because it is a fact* and is contrary to the holding of the Second Circuit which was forced to consider the matter on the record without knowledge of this event. Unfortunately for petitioners the matter was not discovered by they themselves until after their affidavits had been submitted to the District Court.

The briefest of preliminary hearings on the motion to suppress before the District Court would have uncovered all of these facts which are now outside the record and contrary to the express holding of the Second Circuit which the Government seeks to affirm.

These infirmities in the factual record, because no hearing was held, have been preserved by the Government asking for and receiving three adjournments of petition-

ers' request for a preliminary hearing upon the complaint filed before the U. S. Commissioner. There is no rule in federal practice more clearly established than the right of the accused to a reasonably prompt hearing before the Commissioner. In the instant case the complaint was filed on January 29, 1962. The petitioners requested a preliminary hearing on the return date, February 16th. The petitioners with counsel appeared at the hearing and there was no appearance by the complaining witness or counsel for the Government. The Commissioner telephoned the U. S. Attorney's office and at the request of the U. S. Attorney, because of the illness of the attorney handling the case, the Commissioner adjourned the hearing to March 19th. In view of the fact the petitioners were released in custody of their attorney, their counsel consented to the adjournment with the express provision:

> "I would like to state that the matter of a preliminary hearing is of the utmost importance * * * so that we respectfully request that no matter what may intervene during the requested adjournment, that we have a hearing, a preliminary hearing, on the 19th as scheduled. We cannot consent to repeated adjournments in this case."

Thereafter the Government filed an affidavit requesting an additional adjournment from the 19th. The matter was adjourned to March 20th upon which hearing counsel for the Government and the petitioners appeared, but again the complaining witness was absent and the Government stated it was not prepared for the hearing. Over the objection of counsel for petitioners the matter was adjourned a third time to May 1st at 10 o'clock, on the alleged grounds that the understanding between the Solicitor General and Justice Harlan prevented the Government from using the evidence to sustain the complaint. Counsel for the petitioners repeatedly stated that it had consented to the filing of the complaint and that they were

asking for the production of all evidence upon which the complaint was based and subject to their right to suppress the same and the fact that it could not be used in a grand jury proceeding, the petitioners consented to the full use of any of the Government's evidence on the preliminary hearing. Nonetheless, the matter was again adjourned.

The purpose of these repeated adjournments is to prevent the petitioners from establishing factual proof under oath by cross examination of the complaining witness, the Special Agent, that his affidavit originally submitted to the District Court was incomplete and untrue. The Government seeks to have the present petition denied on facts which it knows are incomplete and incorrect. If the Commissioner's hearing were held before the decision by this Court, the Government knows the inaccuracies of the record could be established.

POINT I.

The matter should be remanded to the District Court for a hearing and proceedings de novo in accordance with the established and admitted facts.

This point was not raised or touched by the case of *U. S. v. DiBella* [21, this Term]. This Court has inherent power to correct mistakes of this nature regardless of the statutory procedures and has so held in *U. S. v. Morgan*, 346 U. S. 502 (1953) where the Court pointed out that in the interest of justice the inherent power of the Court is not limited to the statutory *coram nobis* proceeding [Title 28, USC 2255].

POINT II

The Court has power by special mandate to direct the District Court to grant a hearing in accordance with Rule 41 on the issues of fact.

Again this point is not touched by the *DiBella* or *Koenig* decisions of this week. The matter of the petitioners' right to a hearing and the failure of the District Court to comply with the express provision of the rule were not at issue nor was the limitation of the Appellate Court to mandate compliance with the rule considered. In fact the very statement of the DiBella rule requires that this Court shall retain its classical power and jurisdiction to correct a miscarriage of justice, admitted mistake or failure of a lower Court to follow a prescribed rule. A contrary holding would mean that *regardless of the facts or the law* a District Court judge would be empowered to irrevocably effect the dismissal of an important criminal charge, *without a hearing*. This Court has always retained the power to correct such a mistake or abuse against the interests of *either* party.

Moreover, no rule of this Court or of the Federal Judiciary is more firmly established than the right and good sense of requiring a hearing before the District Court *at the initial stages* where it has been shown that constitutional rights may have been abused. *Machibroda v. U. S.*, No. 69 of this Term, is the last of a long line of these cases where the Court pointed out:

> "The statute [in that case, 28 USC 2255] requires a District Court to grant a prompt hearing when such motion is filed and to determine the issues of fact
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> "The Government's contention that his (petitioner's) allegations are improbable and unbelievable cannot

serve to deny him an opportunity to support them by evidence."

The brief in opposition to the present petition makes no attempt to deal with the issues of fact presented even by the incomplete and inaccurate record of this case. The six issues of fact with reference to the record are set forth on Pages 23 and 24 of the brief below. In lieu of explaining or meeting these issues of fact, the Government has attemped to finesse an argument on the right to a hearing by repeating the language of the Courts below that they did not find an issue of fact. On petition to this Court, whether there is an issue of fact or not, rests on the record not the language of opinions below. An issue of fact is a coat of many colors and cannot be painted in the words of the Appellate judge. Aside from the additional facts which have transpired since the hearing the issues on the motion were:

1. Whether the investigation was criminal at its inception.

2. Whether the petitioners were in fact deceived as they stated under oath, supported by strong substantial evidence and other affiants.

3. The Government used the apparent civil authority to compel the petitioners' cooperation.

4. The statement, the Government needed the records "for audit", is false.

5. The Government refused to advise petitioners of their right to counsel.

6. The taxpayers were the present accused in a criminal investigation throughout which required some indication that charges were in fact being prepared against them.

CONCLUSION

WHEREFORE, it is respectfully requested that the petition in the instant case be granted and the Court in the exercise of its inherent jurisdiction and power to order a hearing de novo return the matter to the District Court with a mandate directing a hearing on the petitioners' claim.

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